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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MESSERSCHMITT BOLKOW BLOHM, GmbH.,
Petitioner,

v.

WALKER, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether, on an application for discovery of evidence located abroad from a foreign national over whom the court has personal jurisdiction, a court in the United States may avoid the procedures of the Hague Evidence Convention * by ordering that the production of the foreign documents take place in the United States.

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* Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature*, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (entered into force between the United States and Germany on June 26, 1979).

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WALKER, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Messerschmitt Bolkow Blohm, GmbH., ("Messerschmitt") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.[1]

OPINIONS BELOW

The judgment of the court of appeals (App. A) is reported at 757 F.2d 729; the opinion and order of the district court (App. B) are unreported; the ruling of the magistrate (App. C) is unreported.

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[1] The parties below included plaintiffs Virginia Walker, Anne Fee, J.J. Walker, Louise Walker, Dewey Fee, Hazel Fee, Robert Leo Brown, Mary Jane Brown, and Joan Brown; defendants Messerschmitt, MBB Helicopter Corp. ("MBB"), Lone Star Helicopters, North Central Texas Services (d/b/a Care Flight), Estate of Rick Lemar Fee, and Estate of Billy Wayne Walker; and nominal respondent United States District Judge the Honorable Barefoot Sanders. Messerschmitt's wholly-owned subsidiary is MBB Helicopter Corp.

JURISDICTION

The judgment of the court of appeals was entered April 18, 1985. The petition for writ of certiorari is therefore due on July 17, 1985. This Court has jurisdiction to issue the requested writ under 28 U.S.C. § 1254(1) (1983).

STATUTORY AND TREATY PROVISIONS INVOLVED

28 U.S.C. § 1254(1) (1983) provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . ."

The provisions of Rule 34 of the Federal Rules of Civil Procedure are reproduced at App. D.

The provisions of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature*, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (entered into force between the United States and Germany on June 26, 1979), are reproduced at App. E.

STATEMENT

The factual predicate for this petition is by now familiar to more than a few state and federal courts: A litigant seeks broad, U.S.-style discovery from a foreign litigant of documents located abroad, without using the procedures for obtaining such information established by the Hague Evidence Convention. In this case, discovery was sought in connection with an April 1982 helicopter accident near McKinney, Texas. On February 2, 1983, wrongful death beneficiaries of the three accident victims filed suit in Federal District Court for the Northern District of Texas against the foreign manufacturer of the helicopter, Messerschmitt, and its United

States distributor, MBB Helicopter Corporation.[2] The federal court's jurisdiction was invoked pursuant to 28 U.S.C. § 1332 (1983), as Messerschmitt is a German corporation wholly located in the Federal Republic of Germany and MBB is a corporation with its principal place of business and place of incorportion outside of Texas. Messerschmitt was served in accordance with the Hague Service Convention and MBB was served in accordance with the Texas long-arm statute.

On April 1, 1983, plaintiffs served directly upon Messerschmitt's counsel twenty "Requests for Production of Documents and Things." An additional Request for Production followed on April 14, 1983, seven Requests on July 22, 1983, two on July 29, 1983, and two on December 29, 1983.[3] Although many of these requests would require the production of evidence located in Germany, plaintiffs at no time submitted them in accordance with the procedures established by the Hague Convention. Under that Convention, one party can seek evidence located abroad from another party by causing the U.S. court to issue a letter of request to the foreign court. The Convention provides that such letters of request must "be executed expeditiously" Art. 9 (App. E at 23a) with "appropriate measures of compulsion" Art. 10 (App. E at 23a).

Because plaintiffs failed to proceed under the Hague Evidence Convention, Messerschmitt refused to comply with the requests for production of documents from Germany. Plaintiffs then moved to compel discovery, and Messerschmitt complained that plaintiffs sought to violate

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[2] Messerschmitt and MBB have brought third-party actions against the estates of two of the plaintiffs for contribution and indemnity. Two additional parties have entered the lawsuit as intervenors, asserting a property claim for the helicopter involved in the accident.

[3] Other Notices and Requests were served on Messerschmitt during this time but have since been found to be moot. MBB has been fully responsive to plaintiffs' discovery requests submitted under the Federal Rules of Civil Procedures.

German judicial sovereignty by failing to follow Convention procedures. The magistrate was unmoved by Messerschmitt's argument and granted plaintiffs' Motion to Compel (App. C). On September 12, 1984, the district court affirmed that order, while acknowledging the "conflict in the authorities" (App. B at 11a). After the district court refused to reconsider its ruling, to stay its decision, or to grant leave for an interlocutory appeal, Messerschmitt on October 5, 1984, petitioned the United States Court of Appeals for the Fifth Circuit for an emergency stay and expedited ruling on its petition for a writ of mandamus requiring the district court to vacate its orders. On October 10, 1984, the court of appeals stayed the district court's orders pending its decision on the petition for writ of mandamus.

In support of its mandamus petition, Messerschmitt argued that the procedures established by the Hague Convention for taking evidence abroad are exclusive and mandatory and, in the alternative, that important principles of judicial restraint and international comity require use of Convention procedures as the first step in attempting to secure evidence from abroad. Petitioner further noted that a United States court order directing documents to be produced from within Germany without the permission or assistance of the local courts would constitute a serious violation of Germany's judicial sovereignty.[4]

On April 18, 1985, the court of appeals denied Messerschmitt's mandamus petition. The court acknowledged that *In re Anschuetz & Co., GmbH.*, 754 F.2d 602 (5th Cir. 1985) (recently decided by a different

[4] In its petition for writ of mandamus, Messerschmitt also sought review of the district court's order refusing to quash notices of depositions for certain Messerschmitt officials. Although the court of appeals in its decision reached this issue, since the court of appeals ruling depositions of trial experts, some of whom were previously noticed, have been taken, making the issue moot for present purposes. Messerschmitt therefore does not seek review of this part of the court of appeals judgment.

panel of the same court), the German government had said that United States courts' ordering production of documents located in Germany was an invasion of German sovereignty. The court further observed that "[o]ur pretrial procedures for broad disclosure of documents and depositions of witnesses are alien to a civilian system." 757 F.2d at 732 (App. A at 4a). Nevertheless, the court, relying throughout upon its decision in *Anschuetz*, held that the Convention by its terms was inapplicable to the discovery being sought because the documents were to be produced in the United States. *Id.* at 731 (App. A at 3a). The court went on to consider whether as a matter of comity the discovery at issue here should have been made through the procedures of the Hague Evidence Convention even though use of such procedures was not required as a matter of law. The court concluded that comity does not require resort to Hague Convention procedures where the ordered production of documents is to take place in the United States because such production "does not require any governmental action in Germany, any appearance in Germany of foreign attorneys, or any proceedings in Germany." *Id.* at 732 (App. A at 5a).

REASONS FOR GRANTING THE WRIT [5]

This case presents a question of increasing importance in the administration of justice within the federal and state court systems: when and to what extent litigants must use the procedures of the Hague Evidence Convention to obtain evidence from the territory of nations that, with the United States, have signed and ratified the Hague Evidence Convention. Because they have not yet received guidance from this Court on the question, the lower federal courts and the state courts are issuing a

[5] The question presented by this case and the reasons for granting the writ are substantially the same as the question and reasons presented by the petition for writ of certiorari in *Anschuetz & Co., GmbH. v. Mississippi River Bridge Authority, et al.*, No. 84-—— (petition for writ of certiorari filed July 17, 1985).

growing number of confusing and contradictory decisions. As a result, the effects of the Convention for individual litigants turn upon the particular forum in which they happen to appear. Moreover, the decision of the court of appeals in this case will intensify international conflicts over evidence-gathering in United States proceedings and is unnecessary to protect the right of United States litigants to have a fair hearing on their claims. This Court should grant certiorari in order to put an end to the confusion and to establish the Convention as an effective means for reconciling the United States system of litigation with the legal systems of our trading partners and allies.

I. What Role the Hague Evidence Convention Has in United States Litigation Is an Important Question.

The appropriate role of the Hague Evidence Convention in U.S. litigation is a question of undeniable importance to the administration of justice in federal and state courts. The Hague Evidence Convention creates procedures by which United States litigants in civil cases can obtain evidence from abroad from states that are parties to the Convention. Some of the most important trading partners of the United States have ratified the Convention, including the United Kingdom, the Federal Republic of Germany, France, Italy, Sweden, the Netherlands, Israel, Denmark, and Norway. The growth of international trade has caused a dramatic increase in the number of cases in United States federal and state courts involving parties from these countries.

The Hague Evidence Convention played a minor role in United States litigation with foreign nationals until a growing number of nations had ratified the Convention. Indeed, the first reported U.S. cases in which litigants urged that the Hague procedures be used for obtaining foreign evidence came from the California appeals court in 1981 and 1982,[6] a decade after U.S. ratification in

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[6] *Pierburg GmbH. & Co. KG v. Superior Court*, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982); *Volkswagenwerk A.G. v. Superior Court*, 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1981).

1972. In the last three years, however, the number of reported cases in which courts have addressed the need to resort to the procedures of the Hague Evidence Convention has been increasing rapidly, with at least nine cases in 1983,[7] at least twelve cases in 1984,[8] and at least six cases decided already in 1985.[9] These cases are, of course, only the tip of the much larger iceberg of un-

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[7] *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58 (E.D., Pa. 1983); *Lasky v. Continental Products Corp.*, 569 F. Supp. 1227 (E.D. Pa. 1983); *Wilson v. Stillman & Hoag, Inc.*, 476 N.Y.S.2d 764 (1983); *Schroeder v. Lufthansa German Airlines*, No. 83 C 1928 (N.D. Ill. Sept. 15, 1983) (memorandum opinion); *Thompson v. Continental Machine & Tool Co.*, No. EC 81-181-LS-P (N.D. Miss. Sept. 21, 1983); *Miller v. Hawes Firearm Co.*, No. F82-036 (D.Alaska Oct. 13, 1983); *Cannon v. Arburg Maschinenfabrik*, No. 80 L 2275 (Ill. Cir. Ct. July 21, 1983); *Van Dongen v. Arburg Maschinenfabrik*, No. L-71021-81 (N.J. Super. Ct. July 1, 1983); *Angulo v. Kedzep Ltd.*, 29 Bankr. 417 (S.D. Tex. 1983).

[8] *Laker Airways Ltd. v. Pan American World Airways*, 103 F.R.D. 42 (D.D.C. 1984); *McLaughlin v. Fellows Gear Shaper Co.*, 102 F.R.D. 956 (E.D. Pa. 1984); *International Society for Krishna Consciousness, Inc. v. Lee*, 425 F. Supp. 681 (S.D.N.Y. 1984); *Cooper Indus. v. British Aerospace, Inc.*, 102 F.R.D. 918 (S.D.N.Y. 1984); *Murphy v. Reifenhauser KG Maschinenfabrik*, 101 F.R.D. 360 (D. Vt. 1984); *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503 (N.D. Ill. 1984); *Adidas (Canada) Ltd. v. SS Seatrain Bennington*, Nos. 80 Civ. 1911, 82 Civ. 0375, slip op. (S.D.N.Y. May 30, 1984); *General Electric Co. v. North Star Int'l, Inc.*, No. 83 C 0838 (N.D. Ill. Feb. 21, 1984) (memorandum opinion and order); *Worthington v. Polymer Machinery Corp.*, No. 83-2131 (E.D. Pa. Jan. 12, 1984); *Th. Goldschmidt A.G. v. Smith*, 676 S.W.2d 443 (Tex. Ct. App. 1984); *Vincent v. Ateliers de la Motobecane, S.A.*, 193 N.J. Super. 716, 475 A.2d 686 (1984); *Compagnie Francaise d'Assurance v. Phillips Petroleum Co.*, No. 81 Civ. 4463 (S.D.N.Y. Dec. 10, 1984).

[9] *In re Anschuetz & Co., GmbH.*, 754 F.2d 602 (5th Cir. 1985); *In re Messerschmitt Bolkow Blohm, GmbH.*, 757 F.2d 729 (5th Cir. 1985); *Laker Airways Ltd. v. Pan American World Airways*, No. M. 8-85, slip op. (S.D.N.Y. Mar. 22, 1985); *Gebr. Eickhoff Maschinenfabrik und Eisengieberei v. Starcher*, No. 16562 (W. Va. Mar. 22, 1985); *Performance Indus., Inc. v. Honda Motor Co., Ltd.*, No. 83-4863, slip op. (E.D. Pa. Mar. 1, 1985); *Griffis v. Aerospatiale Helicopter Corp.*, No. A83-602 (D.Alaska June 4, 1985) (order).

reported decisions usually rendered in discovery disputes. With respect to German companies alone, petitioner estimates that there are currently about 1,500 cases pending in the U.S. courts in which the discovery of foreign evidence is an issue.[10]

As a reflection of the growing importance of the dispute among the lower courts over the role of the Hague Convention in U.S. litigation, this Court was twice asked recently to address this question. In the first case, *Volkswagenwerk A.G. v. Falzon*, 104 S. Ct. 1260 (*appeal dismissed*), *reh. denied*, 104 S. Ct. 1932 (1984), a Michigan trial court ordered the German defendant to make its employees available for deposition by U.S. counsel in Germany before U.S. consular officials. On appeal from the Supreme Court of Michigan, the appellee defended this order as lawful under an exchange of diplomatic notes verbale between the United States and Germany covering consular depositions and under the provisions of the Hague Evidence Convention. The Court asked for the views of the Solicitor General on these questions.[11]

In his brief of December 19, 1983, the Solicitor General set forth the position of the United States government that the Hague Evidence Convention "deals comprehensively with the methods available to United States Courts and litigants to obtain proceedings abroad for

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[10] A substantial scholarly literature now exists on the Convention and its role in U.S. litigation. Particularly insightful is Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 U. Miami L. Rev. 733 (1983).

[11] *Volkswagenwerk A.G. v. Falzon*, 104 S. Ct. 62 (1983). By the time the notice of appeal was filed, this Court had already acted twice to stay the threatened depositions, first by order of the Chief Justice before the Michigan Supreme Court's decision (*Volkswagenwerk A.G. v. Falzon*, No. A-191, O.T. 1981 (Aug. 23, 1982), *motion to vacate denied*, Sept. 2, 1982), and second by Justice O'Connor after the Michigan Supreme Court declined to hear the case (*Volkswagenwerk A.G. v. Falzon*, 103 S. Ct. 1810 (1983)).

taking evidence," [12] that the "parties to the Convention contemplated that proceedings not authorized by the Convention would not be permitted," [13] and therefore that the noticed depositions were contrary to the Conventon.[14] The Solicitor General further rejected the assertion that the state trial court could order the defendant to submit to the depositions despite the provisions of the Convention simply because it had personal jurisdiction over the defendant.[15] Nevertheless, the Solicitor General urged the Court not to review *Falzon* on the merits because the U.S. government had ordered its consular officials not to cooperate with plaintiff's counsel, thereby making the depositions impossible as a practical matter.[16] This fact, as well as the relative infrequency of U.S. courts' ordering depositions to be taken abroad, made *Falzon* an unsuitable vehicle for this Court to rule upon the role of the Hague Evidence Convention in U.S. litigation, and the Court accordingly dismissed the appeal.[17] Neither of these considerations applies to the present case, where no intervention by the U.S. government will make the issue moot and what is at issue is the much more common practice of compelling foreign nationals to bring their documents to the United States.

The second recent case in which questions concerning the role of the Hague Evidence Convention were brought to this Court was *Club Mediterranee, A.S. v. Dorin*, 105 S. Ct. 286 (1984) (*appeal dismissed and cert. denied*).

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[12] Brief for the United States as Amicus Curiae at 5, *Volkswagenwerk A.G. v. Falzon*, 104 S. Ct. 1260 (*appeal dismissed*), *reh. denied*, 104 S. Ct. 1932 (1984).

[13] *Id.* at 6.

[14] *Id.* at 7.

[15] *Id.* at 7, n.3.

[16] *Id.* at 11-12.

[17] *Volkswagenwerk A.G. v. Falzon*, 104 S. Ct. 1260 (*appeal dismissed*), *reh. denied*, 104 S. Ct. 1932 (1984).

In that case a New York state trial court had ordered a French defendant to answer interrogatories despite the defendant's claim that at least some of the information required by the interrogatories would have to come from France, which by law prohibited disclosure of information to courts outside France except where the information was sought through the mechanisms of the Hague Evidence Convention. Once again the Court called for the views of the Solicitor General.[18] The Solicitor General stated that the case presented "important questions concerning the proper procedures to be followed by United States courts in ordering discovery where the party from whom discovery is sought claims that the information necessary to respond to the discovery request is located in a foreign state that is a party to the Hague Evidence Convention." [19] Nevertheless, the Solicitor General urged the Court not to grant certiorari because the courts below had not made express findings sufficient for adequate review, particularly as to whether the French government had any objection to the particular discovery sought in that case.[20] The Court followed the suggestion of the Solicitor General, dismissing the appeal and denying the petition in the alternative for certiorari.[21] Once again, however, the Court's failure to grant plenary review in *Club Med* in no way reflects on the importance of the question presented or on the appropriateness of the present case as the vehicle for addressing this question. Here there is a fully developed record, including a clear expression of the German government's objections to the discovery ordered.

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[18] *Club Mediterranee, S.A. v. Dorin*, 104 S. Ct. 1268 (1984).

[19] Brief for the United States as Amicus Curiae at 3, *Club Mediterranee, S.A. v. Dorin*, 105 S. Ct. 286 (1984) (*appeal dismissed and cert. denied*).

[20] *Id.* at 14.

[21] 105 S. Ct. 286 (1984).

II. Lower Federal and State Courts Are Sharply Divided Over the Role of the Hague Evidence Convention in United States Litigation.

The lower federal and state courts are far from reaching a consensus view—or even a majority rule—on whether or in what circumstances the Hague Evidence Convention procedures should be used by United States litigants seeking evidence from abroad. Several courts have concluded, as the West Virginia Supreme Court did in a carefully-reasoned decision handed down less than a month before the ruling of the court of appeals in the instant case, that the procedures of the Hague Evidence Convention must be used in the first instance when a United States litigant seeks to compel a party who is a national of a signatory state to produce documents from abroad.[22] Other courts have concluded, as the court of appeals did here, that the Hague Evidence Convention simply does not apply to discovery of evidence from abroad, so long as the United States court orders that the production of the evidence take place in this country—even though the party is compelled to gather the evidence abroad and transport it to this country.[23] At

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[22] *Gebr. Eickhoff Maschinenfabrik und Eisengieberei v. Starcher*, No. 16562 (W. Va. Mar. 22, 1985). *Accord, Th. Goldschmidt A.G. v. Smith*, 676 S.W.2d 443 (Tex. Ct. App. 1984); *Vincent v. Ateliers de la Motobecane, S.A.*, 193 N.J. Super. 716, 475 A.2d 686 (1984); *General Electric Co. v. North Star Int'l, Inc.*, No. 83 C 0838 (N.D. Ill. Feb. 21, 1984) (memorandum opinion and order); *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58 (E.D. Pa. 1983); *Pierburg GmbH. & Co. KG v. Superior Court*, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982).

[23] *International Society for Krishna Consciousness, Inc. v. Lee*, 425 F. Supp. 681 (S.D.N.Y. 1984); *Cooper Indus. v. British Aerospace, Inc.*, 102 F.R.D. 918 (S.D.N.Y 1984); *Adidas (Canada) Ltd. v. SS Seatrain Bennington*, Nos. 80 Civ. 1911, 82 Civ. 0375, slip op.

the extremes, some courts have ruled that the Hague Evidence Convention is the exclusive means of obtaining evidence from abroad; [24] other courts have ruled that they need not follow Convention procedures even in ordering inspections or interviews on foreign territory.[25]

While there is widespread conflict and disagreement in the lower federal and state courts over the Hague Evidence Convention's impact on discovery of evidence located abroad, the very nature of the issue presented makes its review in plenary decisions of courts of appeals a relatively rare phenomenon: Discovery disputes do not often survive trials on the merits and interlocutory review by writ of mandamus is by its very nature extraordinary and difficult to obtain. At the same time, the large number of conflicting decisions demonstrates both the importance of the matter and the need for definitive appellate guidance. With the Court of Appeals for the Fifth Circuit now squarely in conflict with the Supreme Court of West Virginia [26] and other state courts, only a ruling by this Court can resolve the divergent positions.

(S.D.N.Y. May 30, 1984); *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503 (N.D. Ill. 1984); *Murphy v. Reifenhauser KG Maschinenfabrik*, 101 F.R.D. 360 (D.Vt. 1984); *Lasky v. Continental Products Corp.*, 569 F. Supp. 1227 (E.D. Pa. 1983).

[24] *Cuisinarts, Inc. v. Robot Coupe, S.A.*, No. CV 80 0050083 (Conn. Super. Ct. July 22, 1982) (memorandum of decision on motion for disclosure from a foreign corporation under the Hague Convention).

[25] *See Volkswagenwerk A.G. v. Falzon*, Nos. 77-722-371 NP, 78-803-043 NP (Mich. Cir. Ct. Oct. 7, 1980) (order permitting plaintiffs to attempt to take depositions of German citizens in Germany).

[26] *Gebr. Eickhoff Maschinenfabrik und Eisengieberei v. Starcher*, No. 16562 (W. Va. Mar. 22, 1985).

III. The Court of Appeals in the Present Case Seriously Misapprehended the Role of the Hague Evidence Convention in United States Litigation.

In addition to the importance of the question presented, and the sharp conflicts over the question among the lower courts, the Fifth Circuit's decision stands in marked contrast to the proper comity analysis and treaty construction performed by some other federal and state courts. In essence, the Fifth Circuit has ruled that the Hague Evidence Convention is "optional" and may be disregarded whenever the United States court seeks to compel production of evidence from abroad, provided that the evidence is within the control of a party subject to a court's jurisdiction and provided that the actual physical production of the evidence takes place within the territory of the United States. Such an interpretation contravenes the apparent intent of the parties to the Convention and robs the Convention of its potential role in ameliorating the international conflicts created by United States courts' exercise of jurisdiction to order discovery from abroad.[27]

A. *The Hague Evidence Convention Cannot Properly Be Interpreted as an Optional Means of Obtaining Evidence from the Territory of Signatory States.*

Several courts in the United States, confronted with requests for discovery that attempt to avoid the procedures of the Hague Convention, have required the parties seeking the evidence from abroad to use only Hague Convention procedures.[28] As the court in *Cuisinarts* ob-

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[27] "No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the request for documents associated with investigation and litigation in the United States. Some 15 states [as of 1984] have adopted legislation expressly designed to counter U.S. efforts to secure production of documents situated outside the United States . . . ." Restatement of U.S. Foreign Relations Law (Revised), Tent. Draft No. 6 (Vol. 1) (Apr. 12, 1985), p. 333.

[28] *Worthington v. Polymer Machinery Corp.*, No. 83-2131 (E.D. Pa. Jan. 12, 1984); *Rockwell Int'l Corp. v. Construzioni Aeronau-*

served, "[t]he ratification of the Convention brings to a climax years of effort in the United States by those interested in modernizing and improving international and judicial assistance. Neither in the language of the Convention itself nor in any official communique regarding the effect of the Convention is there any indication that the U.S. Delegation[,] or any other party to the Convention, viewed the document as optional in nature." [29] Some of the principal signatories to the Convention have indicated their understanding that, absent bilateral or other multilateral understandings, Convention procedures were to be the exclusive means of obtaining evidence from abroad for use in civil proceedings.[30] Indeed, it is difficult to see why countries such as Germany agreed to compel their citizens to provide evidence to United States courts if it was not in exchange for some limitation on

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tiche Giovanni Augusta, S.P.A., No. 81-3984 (E.D. Pa. May 17, 1983) (order *reversing* order of Mar. 21, 1983); *Cannon v. Arburg Maschinenfabrik*, No. 80 L 2275 (Ill. Cir. Ct. July 21, 1983); *Kantor v. Cycles Peugeot, S.A.*, No. 81-0423 (D.R.I. Apr. 14, 1982) (memorandum and order); *Cuisinarts, Inc. v. Robot Coupe, S.A.*, No. CV 80 0050083 (Conn. Super. Ct. July 22, 1982) (memorandum of decision on motion for disclosure from a foreign corporation under the Hague Convention); *Langhans v. Johns-Manville Sales Corp.*, No. 535530-7 (Cal. Super. Ct. Aug. 25, 1981 (minute order); *Croxton v. Johns-Manville Sales Corp.*, No. L-6001-79 (N.J. Super. Ct. May 20, 1980).

[29] *Cusinarts, Inc. v. Robot Coupe, S.A.*, No. CV 80 0050083 at 7 (Conn. Super. Ct. July 22, 1982) (memorandum of decision on motion for disclosure from a foreign corporation under the Hague Convention).

[30] For example, the government of the Federal Republic of Germany has repeatedly expressed its view that the Convention is exclusive. *See* Brief of the Federal Republic of Germany as Amicus Curiae at 5-9, *In re Anschuetz & Co., GmbH.*, 754 F.2d 602 (5th Cir. 1985). The French Senate and National Assembly, angered by American litigants' disdain for Convention procedures, have made it a criminal offense to request or transmit certain evidence for use in a foreign proceeding in a matter unauthorized by the Hague Convention or other international treaty. Herzog, *The 1980 French Law on Documents and Information*, 75 Am. J. Int'l L. 382 (1981).

the methods or scope of United States discovery from abroad.[31]

The reluctance of most U.S. courts to accept the exclusivity of Convention discovery procedures stems in significant part from a misunderstanding of the consequences of such acceptance. Refusing to treat Convention discovery procedures as an easily-avoided option would not, as the Fifth Circuit claimed, give to foreign litigants "an unfair evidentiary advantage over their American opponents." 757 F.2d at 731 (App. A at 3a). The Convention in no way prevents courts from protecting the integrity of their factfinding procedures by (1) excluding evidence when the opposing party cannot test its probative value through examination of underlying and related evidence located abroad or (2) drawing adverse inferences from a party's failure to produce voluntarily evidence located abroad. Indeed, U.S. courts may impose a variety of non-punitive sanctions, including judgment of default on the record, upon a foreign litigant unwilling to comply with discovery requests. The Convention deals not at all with what a U.S. court does to decide a case based on the evidence provided or not provided to it.[32] Instead, in our submission, it restricts only the

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[31] *See* Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A. J. 651 (1969) ("In 1964 [four years before the Hague Evidence Convention was negotiated] Rule 28(b) of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 1781 and 1782 were amended to offer to foreign countries and litigants, without a requirement of reciprocity, wide judicial assistance on a unilateral basis for the obtaining of evidence in the United States"); Oxman, *supra* n. 10, at 760 (". . . one may argue that if the convention does not restrict unilateral extraterritorial discovery methods, then the civil law countries received no meaningful quid pro quo for their concession to the United States under the convention").

[32] For example, under the heading "Matters Excluded From the Convention," the following appears in the Explanatory Report of the Rapporteur: "A proposal to regulate the effect of the refusal of a witness to appear and testify before a consul or commissioner was not approved. This is a matter for the domestic law of the forum where the action is to be tried. The judge in charge of the trial

Court's ability to compel, upon pain of monetary fines or other punishment for contempt, the production of evidence located abroad in the territory of a Convention state.[33]

B. *A Proper Comity Analysis Compels Resort to the Procedures of the Hague Convention in the First Instance by United States Courts.*

If, upon examination, this Court decides that the Hague Evidence Convention does not provide the exclusive procedures in civil cases for discovery of evidence located abroad in the territory of contracting states, then U.S. courts should at least be required to exhaust Convention procedures before resorting to other means of discovery potentially offensive to foreign governments. The Fifth Circuit's determination that the Convention need not be employed, even in the first instance, so long as the documents are ordered to be produced in the United States is the result of a faulty analysis of what the principle of comity requires.

Under the principle of comity, U.S. courts seek to accommodate important sovereign interests of other nations, as expressed in those nations' legislative, executive, or judicial acts, where such accommodation can be achieved consistent with the rights of U.S. citizens and others under the protection of U.S. laws.[34] In the discovery area, courts have developed from this general principle of comity the particular rules that foreign discovery ordinarily should be sought by the least intrusive means available, that discovery will be ordered from

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may decide what inference may be drawn from the failure of a party, or of a witness not a party, to give evidence." Amram, *Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* (1972) at 41.

[33] *See Societe Internationale v. Rogers*, 357 U.S. 197, 209-10 (1958) (discussing distinction between a default judgment entered as "mere punishment" and one entered as the result of a "permissible presumption" arising from failure to produce evidence); Moore's Federal Practice ¶ 37.03[2] at 59-62 (1984).

[34] *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

abroad in defiance of the will of foreign sovereigns only to the extent it is strictly necessary, and that generally U.S. sources of evidence should be exhausted before foreign sources are tapped. By a parity of reasoning, comity requires that the procedures of the Hague Evidence Convention for obtaining evidence from foreign sources be exhausted before alternatives are considered, both because the alternatives are viewed by other nations as invading their sovereign interests and because requiring such exhaustion will not seriously impair the rights of U.S. litigants.

In its comity analysis in the present case, the court of appeals entirely misapprehended the German interests at stake, considering only the German interest "in maintaining control over its judicial system." 757 F.2d at 732 (App. A at 4a). Although the court admitted that U.S. style discovery ordered against parties in Germany "may indeed inconvenience the German civilian judicial system," *id.*, it concluded that such "inconvenience" was minimal because an order that German citizens bring their documents to the United States "does not require any governmental action in Germany, any appearance in Germany of foreign attorneys, or any proceedings in Germany." *Id.*

But the sovereign German interest in U.S. discovery of evidence located in Germany goes far beyond "inconvenience" to the German judicial system. In a civil law state such as Germany, the evidence-gathering function is placed in the hands of the courts in order to ensure that discovery will be conducted consistently with the state's jurisprudence governing the occasions and conditions upon which coercive governmental power will compel disclosure of normally private information. This jurisprudence balances, for the general welfare of the foreign state, the conflicting interests implicated by compelled disclosure of information for use in legal proceedings. That balance is necessarily upset, and the state's jurisprudence is necessarily revised, to the extent that information held in the foreign sovereign's territory by na-

tionals of that sovereign is subject to disclosure by orders framed according to the dictates of an alien jurisprudence—as, for example, where Germany or other civil law countries would recognize a privilege (*e.g.*, for a business secret) or mandate a procedure (*e.g.*, examination of a deponent by a judge) not required by the United States or other common law countries. Hague Convention procedures are thus a vital mechanism for providing the foreign state with the opportunity to participate, through its courts, in the discovery process and to help frame an accommodation between the foreign state's legal principles and the U.S. discovery request.

Just as the court of appeals misapprehended the German interest at stake, it likewise misunderstood the United States interest against which the German interest was to be weighed. According to the court of appeals, Hague Convention procedures must be circumvented in order to protect "the American interest in obtaining full pretrial discovery of information relevant to pending litigation in the United States." *Id.* But, of course, that is not what is at stake for the United States at all: the question presented by a foreign national's insistence on exhaustion of Hague Convention procedures is only whether those procedures will be used in the first instance, not whether the requested discovery will ultimately be compelled by the U.S. court. Properly viewed, the U.S. interest in avoiding entirely any use of the Hague Convention procedures, and thus denying the foreign court any opportunity to participate in and inform the discovery process, is quite weak.

To be sure, in many cases the letter of request procedure of the Hague Evidence Convention may be somewhat more time-consuming or cumbersome than a direct discovery order to the foreign party, but that is often true of judicial processes, such as notice and the opportunity to be heard, that afford necessary protections to affected interests. Nor are U.S. interests *ipso facto* invaded if the letter of request is not fully complied with

by the foreign court.[35] In those cases where foreign law or practice blocks some or even all of the requested discovery, the foreign court will advise the United States court, pursuant to Article 13 of the Convention, "immediately" of the "reasons" why the request may not have been executed "in whole or in part." The United States court, having the benefit of these reasons, can then decide what further action is necessary and appropriate.

[35] While Article 23 of the Convention provides that "[a] Contracting State may . . . declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries," U.S. courts should not automatically assume that countries that have exercised their rights under Article 23 will fail to cooperate in providing requested evidence contained in documents. To the contrary, it appears that the reservation was intended only to prevent discovery of a "fishing nature." *See* Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters *reprinted in* 17 *Int'l Legal Materials*, 1417, 1421 (1978). Moreover, the Convention narrowly circumscribes those situations in which the execution of a Letter of Request may be refused. Art. 12. It also expressly contemplates the good faith attempt of foreign courts to implement any legitimate discovery request. Art. 9.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted to afford the Court the opportunity to set forth definitively the role of the Hague Evidence Convention in U.S. litigation before federal and state courts alike.

Respectfully submitted,

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July 17, 1985

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 84-1877

IN RE MESSERSCHMITT BOLKOW BLOHM, GmbH.,
Petitioner.

April 18, 1985

On Petition for Writ of Mandamus to the
United States District Court for the
Northern District of Texas

Strasburger & Price, Royal H. Brin, Jr., Charles M. Hosch, Dallas, Tex., for appellant.

Michael Slack, John Howie, Dallas, Tex., Munson, Munson, Hyndos, Gordon & Pierce, J. Don Gordon, Peter K. Munson, Sherman, Tex., Johnson, Bromberg & Leeds, Charles L. Perry, Dallas, Tex., for appellee.

Before RUBIN, RANDALL and TATE, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Three occupants of a helicopter died when the helicopter crashed in April 1982 near McKinney, Texas. Their wrongful-death and survival-statute beneficiaries sued the manufacturer of the helicopter, Messerschmitt Bolkow Blohm, GmbH. (Messerschmitt), a foreign corporation, and the United States distributor of Messerschmitt's helicopters, MBB Helicopter Corporation (MBB), a Delaware and Pennsylvania corporation which is a wholly-owned subsidiary of Messerschmitt, in federal district court in Texas. The jurisdiction of the

district court over both defendants is conceded. The district court ordered Messerschmitt: (1) to respond to requests for the production of documents by producing in the United States documents in its possession and physically located in Germany; and (2) to produce for depositions in the United States at a reasonable time in advance of trial the persons Messerschmitt may call as expert witnesses at the time of trial. The expert witnesses are German employees of Messerschmitt residing in Germany. The court has issued no subpoena directing the witnesses to appear. Messerschmitt seeks mandamus directing the district court to revoke the discovery orders and requiring instead that discovery be conducted in accordance with the procedures set forth in the Multilateral Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (the Hague Convention).[1] Guided by this court's opinion in *In Re Anschuetz and Company v. Compania Gijonesa de Navegacion*,[2] decided after the district court entered its orders, we hold that the Convention does not apply to the discovery sought here because the proceedings are in a United States court, involve only parties subject to that court's jurisdiction, and ultimately concern only matters that are to occur in the court's jurisdiction, not abroad. We discuss the two discovery problems here involved separately, applying the principles set forth in that decision.

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[1] Done March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (Hague Convention) entered into force for the United States October 7, 1972). The Convention was initially adopted to provide a uniform system of discovery in foreign jurisdictions. It was based on the framework established by the Multilateral Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, done November 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638. West Germany participated effective June 1979.

The following states are parties to the convention: Barbados, Czechoslovakia, Denmark, Finland, France, Germany, Israel, Italy, Luxembourg, the Netherlands, Norway, Portugal, Singapore, Sweden, the United Kingdom, and the United States.

[2] 754 F.2d 602 (5th Cir. 1985).

I. Document Discovery

In *Anschuetz*,[3] we held that the Federal Rules of Civil Procedure, not the Hague Convention, normally govern the discovery of documents from foreign parties subject to the jurisdiction of a United States court, even though those documents are physically located in the territory of a foreign signatory of the Hague Convention. We stated that such discovery should be considered as taking place in the United States and, therefore, is not governed by the Hague Convention.[4] We reasoned that the Hague Convention was " 'not intended to protect foreign parties, over whom an American court properly has jurisdiction, from the normal range of pretrial discovery available under the Federal Rules of Civil Procedure.' "[5] Were the Convention viewed as the exclusive procedure for foreign discovery of foreign parties, these parties would be given an unfair evidentiary advantage over their American opponents. The foreign party would have full discovery of his opponent under the Federal Rules of Civil Procedure, while the American litigant would be forced to rely upon Hague Convention procedures. Should the foreign government prove unwilling to carry out discovery requests under the Convention, the American litigant would be unable to prepare its case against the fully-prepared foreign party.[6]

We stated, however, that United States courts should not intrude unnecessarily into matters of concern to other nations. A district court should consider whether, as a matter of international comity, the parties should be required to proceed under the Hague Convention before

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[3] *Supra* note 2.

[4] *In Re Anschuetz, supra* note 2 at 611, 615.

[5] In *Re Anschuetz, supra* note 2 at 611, *quoting Graco v. Kremlin, Inc.*, 101 F.R.D. 503, 521 (N.D. Ill. 1984).

[6] *In re Anschuetz, supra* note 2 at 606.

discovery is compelled under the Federal Rules of Civil Procedure.[7]

In response to an invitation by the *Anschuetz* panel, the Federal Republic of Germany filed a brief stating that "[c]*ompliance in Germany* with the order of the U.S. District Court *mandating . . . the production of documents located in . . . Germany*, would be a violation of German sovereignty unless the order is transmitted and executed by the method of Letter of Request under the Evidence Convention."[8] The United States Department of Justice also filed a brief urging the court to make a careful comity analysis before departing from Hague Convention procedures. While the *Anschuetz* panel left this comity analysis to the district court on remand, we choose to expedite this litigation by weighing the competing national interests and deciding the legal issue now.[9]

"Comity"[10] requires us to weigh Germany's interest in maintaining control over its judicial system against the Amercan interest in obtaining full pretrial discovery of information relevant to pending litigation in the United States. American discovery procedures may indeed inconvenience the German civilian judicial system. Our pretrial procedures for broad disclosure of documents and depositions of witnesses are alien to a civilian

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[7] *In re Anschuetz, supra* note 2 at 614.

[8] (Emphasis added.)

[9] This suit was filed more than two years ago and remains at the pre-trial discovery stage.

[10] *See Hilton v. Guyot*, 159 U.S. 113, 163-64, 16 S.Ct. 139, 143, 40 L.Ed. 95, 108 (1895); *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C.Cir.1984); *Volkswagenwerk v. Superior Court*, 123 Cal.App.3d 840, 857, 176 Cal.Rptr. 874, 884 (Cal.App. 1981).

system, in which discovery is controlled by judicial officers and restricted in scope.[11]

Discovery, under the Federal Rules, of documents located in Germany need not directly involve German judicial officers; but Germany is legitimately concerned, as evidenced by its brief to the *Anschuetz* panel, lest documents within its borders and owned by its nationals be disclosed in foreign procedures.[12]

The American litigants' interest in promptly obtaining the documents and deposition testimony necessary to prepare for complex litigation in an American court must also be considered. The district court's order does not require any governmental action in Germany, any appearance in Germany of foreign attorneys, or any proceedings in Germany. It requires only that a party admittedly subject to the personal jurisdiction of a United States court produce documents in the United States. The order for production of documents, therefore, appears to balance appropriately the considerations involved.

II. Expert Witnesses

In *Anschuetz*, we held that, when a foreign corporation is subject to the personal jurisdiction of a United States court, the district court may order the taking of its employees' depositions in the United States even though those employees reside within a foreign signatory

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[11] *E.g.*, *Shemanski*, Obtaining Evidence in the Federal Republic of Germany—the Impact of the Hague Evidence Convention on German-American Judicial Cooperation, 17 Int'l Law 465 (1983); Comment, *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters: The Exclusive and Mandatory Procedures for Discovery Abroad*, 132 U.Pa.L.Rev. 1461, 1464 (1984).

[12] *E.g.*, Comment, *supra* note 11, 132 U.Pa.L.Rev. at 1464-65 ("[I]n civil law countries an attempt by a private party to gather evidence for use in a proceeding abroad may be an illegal usurpation of a 'public-judicial' function, and considered an affront to that nation's 'judicial sovereignty.' ").

of the Hague Convention.[13] Because the depositions will in fact be taken in the United States, they are not governed by the Hague Convention.

The American plaintiffs seek only to depose in the United States in advance of trial those employees whom the foreign corporation, Messerschmitt, intends to call as expert witnesses at the trial. Were the Hague Convention the plaintiffs' exclusive remedy, and were they unable to obtain the employees' depositions through Convention procedures, the foreign corporation would be able to present expert witnesses without affording the plaintiffs the opportunity to depose those witnesses before trial. The Convention was not intended to give foreign litigants this kind of advantage in American courts.

The *Anschuetz* panel stated that, in connection with depositions, as with document discovery, a district court should consider whether comity requires that the depositons first be sought under Hague Convention procedures.[14] In its *Anschuetz* brief, Germany stated, "Compliance in Germany with [an] order of the U.S. District Court *mandating the taking of oral depositions in Kiel, Germany* . . . would be a violation of German sovereignty unless the order is transmitted and executed . . . under the [Hague] Evidence Convention."[15] The district court order that German nationals be produced for deposition in the United States might concern Germany, but it does not involve alien procedures on German soil, is directed to the party-defendant and not the foreign witnesses, and

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[13] *In re Anschuetz, supra* note 2 at 615.

[14] *In re Anschuetz, supra* note 2 at 614. Taking the employees' depositions in Germany under the Hague Convention would require either a voluntary appearance before a United States diplomatic officer or consular agent (Hague Convention, *supra* note 1, Arts. 15, 16), the assistance of Germany to obtain compulsory attendance (Convention Art. 18), or the services of a commissioner appointed with the consent of Germany (Convention Art. 17).

[15] (Emphasis added.)

is enforceable only by procedures and sanctions directed to a party to the litigation in the forum court. The order appears to be a complement to the measures for trial preparation expressly sanctioned by Federal Rule of Civil Procedure 26(b)(4), the applicable text of which is set forth in the footnote.[16] The order therefore does not implicate the comity considerations addressed in *Anschuetz*.[17]

Were the witnesses to be deposed in Germany, other considerations would be applicable. The Hague Convention provides convenient procedures for taking witnesses' depositions in Germany without unnecessarily offending German sovereignty. But what would be appropriate for depositions on foreign soil need not be determined here. If within a reasonable period of time prior to the trial date, to be fixed by the district court, Messerschmitt does not arrange for the appearance of its employee-expert witnesses for depositions in the United States, the district court may invoke any of the sanctions available by virtue of the Federal Rules to compel compliance with its orders, including the exclusion of the employees' testimony at trial.

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[16] (4) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

[17] *See In re Anschutez, supra* note 2 at 615.

The district court may require that the production both of documents and witnesses for deposition be completed sufficiently in advance of trial to permit adequate pretrial preparation.

The plaintiffs have urged us to decide this case on the basis that Messerschmitt's creation of a subsidiary to operate under the laws of the United States waives its rights under the Hague Convention. They do not contend that MBB is either a sham corporation or the artificial alter-ego of Messerschmitt. Counsel for plaintiffs cites no authority and gives no reason for disregarding the independent corporate existence of the subsidiary or treating its creation as a waiver of the foreign corporation's treaty rights. *Cooper Industries, Inc. v. British Aerospace* [18] is inapposite, for its rationale is that a domestic corporation "cannot be allowed to shield crucial documents from discovery . . . merely by storing them with its affiliate abroad. Nor can it shield documents by destroying its own copies and relying on customary access to copies maintained by its affiliate abroad." [19] There is not even a suggestion here, let alone evidence, that either MBB or Messerschmitt has engaged in such tactics. The *Cooper* court went on to hold that the documents were within the domestic defendant's custody because that defendant sold and serviced planes to which the documents, mostly service manuals and blueprints, related. The record lacks evidence from which we might conclude that MBB has custody or control of the documents. To the extent the Hague Convention might be applicable to future discovery proceedings under the principles of *Anschuetz*, it was not waived by creation of the subsidiary.

Finding nothing in the district court orders that transgresses *Anschuetz*, we DENY the petition for mandamus.

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[18] 102 F.R.D. 918 (S.D.N.Y.1984).

[19] *Id.* at 920.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-83-0199-H

Consolidated with
Civil Action No. 3-83-1765-H

VIRGINIA WALKER, ET AL.,
Plaintiffs

LONE STAR HELICOPTERS AND
NORTH CENTRAL TEXAS SERVICES,
d/b/a CARE FLIGHT,
Intervenors/Counter Defendants

v.

MESSERSCHMITT BOLKOW BLOHM, GmbH.,
Defendants/Third-Party Plaintiffs/
Counter Defendants

v.

THE ESTATE OF RICK LEMAR FEE AND THE
ESTATE OF BILLY WAYNE WALKER,
Third-Party Defendants

Filed Sept. 12, 1984

ORDER

This case is before the Court on the Application for Review of Magistrate's Ruling, filed by Defendant Messerschmitt Bolkow Blohm, GmbH. ("Messerschmitt") on August 6, 1984; Messerschmitt's supplemental correspondence, filed August 16 and August 30, 1984; Plaintiff's Reply to Messerschmitt's Application for Review of Magistrate's Ruling, filed by Plaintiffs Virginia Walker, et al., on August 16, 1984; and Brief in Support of Magistrate's Ruling, filed by Plaintiffs Joan Brown, et al., on August 16, 1984.

This discovery dispute arises from the service of a Request for Production of Documents and Things upon Messerschmitt by Plaintiffs. Subsequently, Plaintiffs filed a Motion to Compel Discovery, complaining of Messerschmitt's failure to comply with requests to produce certain documents located in the Federal Republic of Germany. On July 25, 1984, the Magistrate granted Plaintiff's Motion to Compel Discovery, in particular with respect to Requests for Production of Documents and Things Nos. 1, 2, 5, 6 and 7. Messerschmitt now seeks review in this Court pursuant to 28 U.S.C. 636(b)(1)(A) and Miscellaneous Order No. 6.

Messerschmitt's objection to the discovery request is based upon Plaintiff's failure to comply with the Hague Convention for Taking Evidence Abroad which establishes an international procedure for obtaining evidence in foreign jurisdictions. In particular, Messerschmitt emphasizes Plaintiffs' failure to comply with protocol by transmitting a Letter of Request to the proper authorities in the Federal Republic of Germany. Plaintiffs respond that compliance with the Convention is neither mandatory nor possible, since the Federal Republic of Germany has filed a reservation to the Convention which declares it will not execute Letters of Request for the purpose of obtaining pretrial discovery of documents.

Messerschmitt raises no objection as to the relevancy or scope of the discovery sought. Rather, the dispute between the parties focuses on the lack of compliance with the Hague Convention for Taking Evidence Abroad. The Magistrate recognized the current conflict in the authorities regarding the effect of such noncompliance on a litigant's efforts to obtain discovery. *See, e.g., Lasky v. Continental Products Corporation,* 569 F.Supp. 1227 (E.D.Pa. 1983) (requiring compliance of a West German defendant with the Federal Rules of Civil Procedure where the court had proper jurisdiction over the foreign entity); *Philadelphia Gear Corporation v. American Pfauter Corporation,* 100 F.R.D. 58 (E.D.Pa. 1983) (rejecting *Lasky* and requiring compliance with the Hague Convention despite reservation of Federal Republic of Germany). *See also Murphy v. Reifenhauser Kg Maschinenfabrik,* —— F.Supp. —— (D.Vt. 1984); *General Electric v. North Star International,* —— F.Supp. —— (N.D.Ill. 1984). The Magistrate determined that *Lasky* states the better rule in view of the current state of the law and the nonintrusive nature of the discovery sought by Plaintiffs; this Court concurs with the Magistrate.

The Court notes the cases currently before the Fifth Circuit, *In re Anschuetz & Co. GmbH.,* Cause No. 84-3286; and the United States Supreme Court, *Club Mediterranee, S.A. v. Dorin,* appeal filed, 52 U.S.L.W. 3210 (N.Y. App. Div. September 16, 1983) which may relate to the issue decided by the Magistrate. As Messerschmitt itself points out, however, such cases are still pending, and it would not serve the cause of effective judicial administration for this Court to delay ruling on a discovery matter until those cases are decided by the higher courts.

The Court is of the opinion that the Magistrate's ruling granting Plaintiffs' Motion to Compel Discovery is not "clearly erroneous or contrary to law", 28 U.S.C. § 636(b)(1)(A), particularly in view of the undisputed

relevancy and apparent reasonableness of Plaintiffs' Request for Production.

Accordingly, the Magistrate's Order should be, and it is hereby, AFFIRMED.

SO ORDERED.

DATED: September 12, 1984.

/s/ Barefoot Sanders
BAREFOOT SANDERS
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil No. CA-3-83-0199-H

Consolidated with
Civil No. CA-3-83-1765-H

VIRGINIA WALKER, ET AL.,
Plaintiffs

LONE STAR HELICOPTERS, *et al.*,
Intervenors

vs.

MESSERSCHMITT BOLKOW BLOHM,
GmbH. and MBB HELICOPTER CORP.
Defendants

[Filed July 25, 1984]

ORDER

Under authority of 28 U.S.C. § 636(b) and the Local Rules of this Court, plaintiffs' motion for partial stay of Magistrate's Order, filed June 21, 1984, and plaintiffs' motion to compel defendant Messerschmitt Bolkow Blohm GmbH. to respond to requests for production of documents and things, filed June 15, 1984, were referred to the Magistrate for hearing and determination. A hearing was held on July 16, 1984 and counsel for all parties were present. And having reviewed the said motions and

responses thereto, and having further reviewed the affidavits and other documents submitted in support thereof, and having heard the arguments of counsel,

IT IS THEREFORE ORDERED that plaintiffs' application for a partial stay of the Magistrate's Order be, and the same is, hereby denied, and plaintiffs shall serve complete answers to interrogatories and document requests within thirty (30) days of the date of this Order.

IT IS FURTHER ORDERED that plaintiffs' motion to compel defendant Messerschmitt Bolkow Blohm, GmbH. to respond to requests for production of documents and things be, and the same is, hereby granted, and defendant Messerschmitt Bolkow Blohm, GmbH. shall respond to requests for production of documents and things Nos. 1, 2, 5, 6 and 7 within thirty (30) days of the date of this Order. The parties have ably briefed and argued the important question presented by this motion, and, while there is a sharp conflict in the authorities, I believe that the better rule is that stated in *Lasky v. Continental Products Corp.*, 569 F. Supp. 1227 (E. D. Pennsylvania, 1983). Plaintiffs here seek only the production of documents and things; they do not seek to conduct discovery in the Federal Republic of Germany, nor do they seek to require affidavits to be made there. Defendants have suggested that plaintiffs must first submit letter requests to this defendant as required by the appropriate provisions of the Hague Convention, 28 U.S.C. § 1781. But the reservation by the Federal Republic of Germany which declares that it will not execute letters of requests for the purpose of obtaining pretrial discovery of documents establishes that such a request by plaintiffs here would be a futile gesture. Defendant acknowledges that MBB Helicopter Corporation, the other defendant in this case, is a wholly-owned subsidiary of this defendant. I believe that the fact that defendant has established a wholly-owned subsidiary in the United States and conducts business in the United States through such subsidiary requires

defendant to respond to reasonable discovery requests, such as the requests for documents which plaintiffs have made here.

IT IS FURTHER ORDERED that this Order be, and the same is, hereby stayed pending disposition by the Judge of this Court of any objections which may be made within the time provided by Rule 72(a) of the Federal Rules of Civil Procedure.

All relief not expressly granted herein is denied.

SIGNED this 25th day of July, 1984.

/s/ John B. Tolle
United States Magistrate

APPENDIX D

FEDERAL RULES OF CIVIL PROCEDURE

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(a) Scope. Any party may serve on any other party request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form) or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a re-

sponse within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980.)

APPENDIX E

MULTILATERAL

Taking of Evidence Abroad

Convention adopted at the Eleventh Session of The Hague Conference on Private International Law October 26, 1968;

Opened for signature at The Hague March 18, 1970;

Signed on behalf of the United States of America July 27, 1970;

Ratification advised by the Senate of the United States of America June 13, 1972;

Ratified by the President of the United States of America July 15, 1972;

Ratification of the United States of America deposited with the Ministry of Foreign Affairs of the Netherlands August 8, 1972;

Proclaimed by the President of the United States of America September 15, 1972;

Entered into force with respect to the United States of America October 7, 1972.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

CONSIDERING THAT:

The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, adopted at the Eleventh Session of The Hague Conference on Private International Law on October 26, 1968, was opened for signature at The Hague on March 18, 1970, and was signed for the United States of America on July 27, 1970, the text of which in the French and English languages is annexed;

The Senate of the United States of America by its resolution of June 13, 1972, two-thirds of the Senators present concurring, gave its advice and consent to the ratification of that Convention;

The President ratified the Convention on July 15, 1972, and the instrument of ratification was deposited with the Ministry of Foreign Affairs of the Netherlands on August 8, 1972;

Article 37 of the Convention provides that it shall enter into force on the sixtieth day after the deposit of the third instrument of ratification; and

The Convention accordingly will enter into force for the United States of America on October 7, 1972, instruments of ratification having been deposited by Denmark and Norway on June 20, 1972 and August 3, 1972, respectively;

NOW, THEREFORE, I, Richard Nixon, President of the United States of America, proclaim and make public the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, to the end that it shall be observed and fulfilled with good faith on and after October 7, 1972 by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this fifteenth day of September in the year of our Lord one thousand nine hundred seventy two and of
[SEAL] the Independence of the United States of America the one hundred ninety-seventh.

RICHARD NIXON

By the President:

WILLIAM P. ROGERS
Secretary of State

CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

The States signatory to the present Convention,

Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose,

Desiring to improve mutual judicial co-operation in civil or commercial matters,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions—

CHAPTER I—LETTERS OF REQUEST

ARTICLE 1

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.

A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

The expression 'other judicial act' does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

ARTICLE 2

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organize the Central Authority in accordance with its own law.

Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

ARTICLE 3

A Letter of Request shall specify—

(a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;

(b) the names and addresses of the parties to the proceedings and their representatives, if any;

(c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;

(d) the evidence to the obtained or other judicial act to be performed.

Where appropriate, the Letter shall specify, inter alia—

(e) the names and addresses of the persons to be examined;

(f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;

(g) the documents or other property, real or personal, to be inspected;

(h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;

(i) any special method or procedure to be followed under Article 9.

A Letter may also mention any information necessary for the application of Article 11.

No legalization or other like formality may be required.

ARTICLE 4

A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.

Nevertheless, a Contracting State shall accept a Letter in either English or French, or a translation into one of these languages, unless it has made the reservation authorized by Article 33.

A Contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters in one of these languages for the whole of its territory, shall, by declaration, specify the language in which the Letter or translation thereof shall be expressed for execution in the specified parts of its territory. In case of failure to comply with this declaration, without justifiable excuse, the costs of translation into the required language shall be borne by the State of origin.

A Contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.

Any translation accompanying a Letter shall be certified as correct, either by a diplomatic officer or consular agent or by a sworn translator or by any other person so authorized in either State.

ARTICLE 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

ARTICLE 6

If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter

shall be sent forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

ARTICLE 7

The requesting authority shall, if it so desires, be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives, if any, may be present. This information shall be sent directly to the parties or their representatives when the authority of the State of origin so requests.

ARTICLE 8

A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorization by the competent authority designated by the declaring State may be required.

ARTICLE 9

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.

A Letter of Request shall be executed expeditiously.

ARTICLE 10

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by

its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

ARTICLE 11

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence—

(a) under the law of the State of execution; or

(b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.

A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

ARTICLE 12

The execution of a Letter of Request may be refused only to the extent that—

(a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or

(b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.

ARTICLE 13

The documents establishing the execution of the Letter of Request shall be sent by the requested authority to

the requesting authority by the same channel which was used by the latter.

In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

ARTICLE 14

The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.

Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.

The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.

CHAPTER II—TAKING OF EVIDENCE BY DIPLOMATIC OFFICERS, CONSULAR AGENTS AND COMMISSIONERS

ARTICLE 15

In a civil or commercial matter, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he repre-

sents in aid of proceedings commenced in the courts of a State which he represents.

A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State.

ARTICLE 16

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the evidence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if—

(a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

ARTICLE 17

In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if—

(a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

ARTICLE 18

A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.

If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

ARTICLE 19

The competent authority, in giving the permission referred to in Articles 15, 16 or 17, or in granting the application referred to in Article 18, may lay down such conditions as it deems fit, *inter alia*, as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence; in such a case a representative of the authority shall be entitled to be present at the taking of the evidence.

ARTICLE 20

In the taking of evidence under any Article of this Chapter persons concerned may be legally represented.

ARTICLE 21

Where a diplomatic officer, consular agent or commissioner is authorized under Articles 15, 16 or 17 to take evidence—

(a) he may take all kinds of evidence which are not incompatible with the law of the State where the evi-

dence is taken or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;

(b) a request to a person to appear or to give evidence shall, unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a translation into such language;

(c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;

(d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;

(e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.

ARTICLE 22

The fact that an attempt to take evidence under the procedure laid down in this Chapter has failed, owing to the refusal of a person to give evidence, shall not prevent an application being subsequently made to take the evidence in accordance with Chapter I.

CHAPTER III—GENERAL CLAUSES

ARTICLE 23

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining

pre-trial discovery of documents as known in Common Law countries.

ARTICLE 24

A Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence. However, Letters of Request may in all cases be sent to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

ARTICLE 25

A Contracting State which has more than one legal system may designate the authorities of one of such systems, which shall have exclusive competence to execute Letters of Request pursuant to this Convention.

ARTICLE 26

A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of Request, for the service of process necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence.

Where a State has made a request pursuant to the above paragraph, any other Contracting State may re-request from that State the reimbursement of similar fees and costs.

ARTICLE 27

The provisions of the present Convention shall not prevent a Contracting State from—

(a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;

(b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;

(c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

ARTICLE 28

The present Convention shall not prevent an agreement between any two or more Contracting States to derogate from—

(a) the provisions of Article 2 with respect to methods of transmitting Letters of Request;

(b) the provisions of Article 4 with respect to the languages which may be used;

(c) the provisions of Article 8 with respect to the presence of judicial personnel at the execution of Letters;

(d) the provisions of Article 11 with respect to the privileges and duties of witnesses to refuse to give evidence;

(e) the provisions of Article 13 with respect to the methods of returning executed Letters to the requesting authority;

(f) the provisions of Article 14 with respect to fees and costs;

(g) the provisions of Chapter II.

ARTICLE 29

Between Parties to the present Convention who are also Parties to one or both of the Conventions on Civil Procedure signed at the Hague on the 17th of July 1905 [1] and the 1st of March 1954, [2] this Convention shall replace Articles 8-16 of the earlier Conventions.

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[1] 99 *British Foreign and State Papers* 990.

[2] 286 UNTS 265.

ARTICLE 30

The present Convention shall not affect the application of Article 23 of the Convention of 1905, or of Article 24 of the Convention of 1954.

ARTICLE 31

Supplementary Agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention unless the Parties have otherwise agreed.

ARTICLE 32

Without prejudice to the provisions of Articles 29 and 31, the present Convention shall not derogate from conventions containing provisions on the matters covered by this Convention to which the Contracting States are, or shall become Parties.

ARTICLE 33

A State may, at the time of signature, ratification or accession exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted.

Each Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the sixtieth day after notification of the withdrawal.

When a State has made a reservation, any other State affected thereby may apply the same rule against the reserving State.

ARTICLE 34

A State may at any time withdraw or modify a declaration.

ARTICLE 35

A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the designation of authorities, pursuant to Articles 2, 8, 24 and 25.

A Contracting State shall likewise inform the Ministry, where appropriate, of the following—

(a) the designation of the authorities to whom notice must be given, whose permission may be required, and whose assistance may be invoked in the taking of evidence by diplomatic officers and consular agents, pursuant to Articles 15, 16 and 18 respectively;

(b) the designation of the authorities whose permission may be required in the taking of evidence by commissioners pursuant to Article 17 and of those who may grant the assistance provided for in Article 18;

(c) declarations pursuant to Article 4, 8, 11, 15, 16, 17, 18, 23 and 27;

(d) any withdrawal or modification of the above designations and declarations;

(e) the withdrawal of any reservation.

ARTICLE 36

Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.

ARTICLE 37

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

ARTICLE 38

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 37.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

ARTICLE 39

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialized agency of that Organization, or a Party to the Statute of the International Court of Justice[1] may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 38.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

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[1] TS 993; 59 Stat. 1055.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

ARTICLE 40

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.[1]

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification indicated in the preceding paragraph.

ARTICLE 41

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 38, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affiairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

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[1] Extended to Guam, Puerto Rico, and the Virgin Islands pursuant to notification sent by the American Embassy at The Hague on Feb. 6, 1913.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

ARTICLE 42

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 37, and to the States which have acceded in accordance with Article 39, of the following—

(a) the signatures and ratifications referred to in Article 37;

(b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 38;

(c) the accessions referred to in Article 39 and the dates on which they take effect;

(d) the extensions referred to in Article 40 and the dates on which they take effect;

(e) the designations, reservations and declarations referred to in Article 33 and 35;

(f) the denunciations referred to in the third paragraph of Article 41.

IN WITNESS WHEREOF the undersigned being duly authorized thereto, have signed the present Convention.

DONE at The Hague, on the 18th day of March 1970, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.